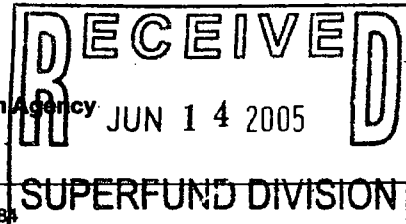


Superfund
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U.S. EPA REGION 5
OFFICE OF REGIONAL ADMINISTRATOR

Mr. Michael Lynch
Illinois Tool Works
3600 West Lake Avenue
Glenview, Illinois 60026-1215

Re: South Dayton Dump site; VAP Eligibility; VAP Standards in Administrative/Judicial Order

Dear Mr. Lynch:

This letter follows our receipt of a copy of your April 15, 2005 letter to U.S. EPA Regional Administrator Bharat Mathur regarding the South Dayton Dump site ("Site") and our review of U.S. EPA's May 9, 2005 response. As you continue to explore alternative approaches that may be available for the Site, we felt additional clarification of Ohio EPA's position might be useful.

With respect to ITW's research of Ohio's position, ITW does not challenge Ohio EPA's view that the Site is ineligible for the VAP,¹ but suggests that either judicial or administrative orders can be used to investigate or remediate the Site using VAP protocols and standards. Specifically, ITW's April 15th letter contends that "Ohio statutes do not prohibit the Ohio EPA from entering into an administrative or judicial order requiring private parties to investigate and/or remediate a site according to the protocols and standards established under the [VAP], even when the site is not eligible for the VAP." We find ITW's interpretation problematic for several reasons.

First, the VAP statute, ORC § 3746.02(A)(1), states that "[n]othing in [chapter 3746] applies to . . . [p]roperty for which a voluntary action is precluded by federal law or regulations . . . including . . . [CERCLA]." Moreover, the VAP eligibility rule, OAC rule 3745-300-02(A), provides that the VAP rules (including the protocols and standards mentioned above) "apply only to the investigation, identification and remediation of hazardous substances or petroleum for property which is eligible for the [VAP]." Therefore, if a property is not eligible for the VAP, then the VAP standards do not apply to the investigation and remediation of that property.

¹ Ohio's position is based upon ORC § 3746.02(A)(1)(d) and OAC rule 3745-300-02(C)(4), which declares ineligible "[a]ny property that is the subject of a federal enforcement action which requires site assessment, removal or remedial activities pursuant to any federal laws and regulations, including [CERCLA and the NCP]." See also Section IV, Applicability, ¶ D of the July 31, 2001 Superfund Memorandum of Agreement.

Bob Taft, Governor
Bruce Johnson, Lieutenant Governor
Joseph P. Koncelik, Director

Second, the only "administrative" order contemplated by the VAP statute to be issued upon a demonstration that a property meets VAP applicable standards is a VAP covenant not to sue, pursuant to Ohio Revised Code ("ORC") §3746.12(A), and a covenant not to sue may not be issued unless the property is eligible for the VAP.²

Third, the only other administrative order mentioned in the VAP statute is the draft "enforcement order" mentioned in the "sufficient evidence" paragraph of the eligibility section.³ The enforcement order is a clear alternative to the VAP covenant not to sue. If a property owner "does not present sufficient evidence to the director that the property owner has entered into the [VAP] and is proceeding expeditiously to address [the] threat" identified in the "enforcement letter," then the property owner would not be eligible for the VAP. Accordingly, OAC chapter 3745-300, i.e., VAP applicable standards, would not apply. See OAC rule 3745-300-02(A).

The VAP statute does not contemplate the use of orders to implement a VAP cleanup. This reflects an important policy underpinning for Ohio's voluntary program; that is, the program is voluntary, not ordered by the Agency. It was designed to allow a party to investigate or clean up a property and walk away at any point in the process. The Agency has implemented the program in accordance with this policy and the statute.

The unresolved problem for the ITW proposal, as we understand it, is that the Site is ineligible for the VAP classic or MOA tracks. As stated above, if a property is not eligible for the VAP, then the VAP standards do not apply to the investigation and remediation of that property. Even if the law authorized the director to order a party to comply with VAP standards and processes, the law does not allow the director to apply VAP standards to an ineligible site.

U.S. EPA's process for withdrawing a proposal for NPL listing is initiated once adequate investigation or clean up is completed. Ohio's VAP and its standards can not be used for the investigation or clean up of the Site. Ohio EPA has no basis for requesting the Governor to withdraw his support for listing the Site since no viable path for investigation and cleanup under an Ohio program exists at this time.

Should you have any questions in this regard, please contact me at your convenience.

Sincerely,


Cynthia A. Hafner
Chief, DERR

cc: Bahrat Mathur
Kate Bartter

² See ORC §3746.02(A) and OAC rule 3745-300-02(A) ("Applicability. Chapter 3746. of the Revised Code and this chapter apply only to the investigation, identification and remediation of hazardous substances or petroleum for property which is eligible for the [VAP]").

³ See ORC § 3746.02(A)(5). See also OAC rule 3745-300-02(C)(8).